No. 22120

IN THE

United States Court of Appeals For the Ninth Circuit

MARGIE J. ELLIOTT and LON ELLIOTT,
wife and husband,
Appellants,

v.

ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

ADDITIONAL STATEMENT OF THE CASE

Appellee deems it necessary that it enlarge upon the statement of the case set forth in appellants' brief, for purposes of clarity and completeness.

The only evidence presented by appellants in support of their contentions of negligence and/or breach of warranty consisted of the testimony of their expert, Mr. C. V. Smith.

It is, in part, appellee's contention on this appeal that appellants' evidence was legally insufficient to warrant submission to the jury of the issue of alleged breach of implied warranty and, accordingly, it is believed necessary to critically examine Mr. Smith's testimony, his opinions, and the predicate for his stated opinions.

Mr. Smith testified that there were "scratches" on the neck of the bottle (Ex. 2), and that such "scratches", in his judgment, were deep enough to cause a weakness in the glass (Tr. 144). He stated, however, that he could not say what had caused the "scratches" (Tr. 147); he conceded that the "scratches" he observed were from an area of the bottle not involved in the fracture (Tr. 165); and he did not know whether there were such "scratches" in the area where the fracture occurred (Tr. 165-166). He stated that he had made no attempt to reproduce such "scratches" on other bottles and he had made no test to determine if such "scratches" in fact produced a weakness in the bottle (Tr. 167).

Ultimately, Mr. Smith's opinion that the bottle was defective at the time it left appellee's control was predicated upon his opinion (which is quoted at page 4 of Appellants' Brief) that the defect in the bottle, which caused the fracture, resulted from the capping operation employed by appellee (Tr. 159-160). He stated elsewhere that the final cause of the fracture was "the capping device as it came down and crimped the cap" (Tr. 167). Mr. Smith further advised that when he referred to "crimping the cap" by the capping machine, he was referring to a mechanism employed in the bottling process "that puts the little marks around the edge" of the

cap—"the little indentations that are put in by the ends of the fingers of the crimping machine" (Tr. 168). The "crimping machine", he elaborated, is the mechanism which puts the cap on the bottle and after it puts the cap on "the fingers" of the machine squeeze the sides of the cap against the bottle (Tr. 168). He again affirmed that it was the action of the "crimping machine" which caused the bottle (Ex. 2) to fracture (Tr. 168).

Mr. Smith expressed certainty that there was such a "claw like mechanism" which is used to put caps on bottles and which squeezes the sides of the cap against the bottle (Tr. 175). He did concede that he was unfamiliar with the nature and extent of the forces applied to a bottle during a capping operation (Tr. 173-175). As he put it: "No, I don't know the exact forces that are on crimping claws" (Tr. 173). Most significantly, Mr. Smith stated that he was familiar with the details of appellee's bottling process "in basic principle only," and he conceded that he had not been in appellee's plant within the last ten years (Tr. 167).

In point of fact, it was established by the evidence that Mr. Smith's visualization of what occurred during the bottling process employed by appellee was grossly inaccurate.

The evidence established that appellee's bottling process operates in the following manner: Used bottles are brought into the plant from the trade. They are first visually inspected for debris and defects (Tr. 246). The bottles are then mechanically taken from the case by a "climax unloader", which operates by rubber caps being fitted over the top of the bottles and suction being applied to secure them (Tr. 246-247; Ex. A-1). Then the

bottles are moved mechanically to the washer and after being thoroughly cleaned are placed mechanically on a conveyor chain (Ex. A-1, A-2; Tr. 248). As the bottles leave the washer they are again inspected visually for defects and debris against a backdrop of bright, fluorescent lighting (Ex. A-2; Tr. 248). Following that, the bottles are passed through an electronic inspector which scans them for debris and automatically rejects unsuitable containers (Ex. A-3; Tr. 249-250). The bottles then go to the filler machine (Ex. A-4 desig. "F"; Tr. 250-251), and then on to the capping machine (Ex. A-5, desig. "C"; Tr. 251). As the bottles pass through the filler machine "vent tubes" are automatically fed into the top of each bottle and an air-tight seal is effected by a gasket at the upper end of the "vent tubes". Once the seal is complete, the "vent tubes" inject into the bottles a counter pressure equal to 1½ times the pressure that the bottle will contain after filling and capping. The counter pressure serves two purposes: If a bottle is structurally weak, it will be exploded by the pressure; and, it would not be possible to fill the bottles with carbonated beverages without the pressure inside the bottle being equivalent to the pressure of the carbonated liquid (Tr. 252, 253, 254, 336, 337).

When thus filled the bottles pass to the capping machine which consists of twelve crowning heads (Ex. A-7, desig. "head"; Tr. 254, 255). The part of the machine which actually places the cap or crown on the bottles is called a "flexible throat" (Ex. A-8; Tr. 255). Exhibit A-8 is the type of "flexible throat" that has been in use in appellee's plant for many years (Tr. 256, 340). The bot-

tle caps are fed into the crowning head from a "cap chute" (Ex. A-6; Tr. 257).

The bottle caps are not manufactured by appellee. As manufactured they are identical in appearance to the caps contained in Ex. A-9. That is, the edges of the caps are crimped in the cap manufacturing process. There is no mechanism in appellee's bottling process which puts crimps in the caps (Ex. A-9; Tr. 257-260, 342, 343). The caps are fed from the "cap chute" into the crowning head and are then affixed to the bottles by the crowning throat (Ex. A-8; Tr. 264, 265). There are absolutely no "claws" which grip the cap and squeeze it against the edges of the bottle in the capping process (Tr. 265, 266, 343).

The crowning throat (Ex. A-8) does not apply pressure against the sides of the bottle in the capping process. The throat is constructed with a bevel—the inside diameter is greater at the bottom than at the top—which has the effect of flattening the skirt of the cap (Ex. A-9) against the bottle neck as the throat is driven down over the cap. The throat is designated a "flexible throat" because it is designed to expand slightly as it is forced down over the cap. The throat at no time contracts against the cap (Tr. 275-280, 338-342).

The witness, Mr. Duncan, demonstrated in open court how the crowning throat operates. Before the jury, he placed a cap from Exhibit A-9 on a bottle (Ex. A-10) and after seating the crowning throat over the cap, struck the throat with his hand until the cap was seated on Exhibit A-10 (Tr. 281). It is to be noted that the bottle, Exhibit A-10, has markings along its neck which are identical to those on Exhibit 2 which Mr. Smith described as

"scratches".

When the crowning throat is driven down over the cap the bottles are subjected to between 400 and 800 pounds pressure (Tr. 267, 340).

What appellants' witness, Mr. Smith, described as "scratches" on Exhibit 2 are not "scratches" at all, but are marks left on bottles as a result of the molding process, and such marks in no way affect the structural integrity of a bottle (Tr. 269, 316, 349, 350).

Appellant wife testified that the bottle fractured as she was attempting to open it with a standard bottle opener, Exhibit 1. All witnesses including appellants' expert Mr. Smith, agreed that the cap showed no evidence of being loosened and no evidence that the opener, Exhibit 1, had ever been applied to it (Tr. 149, 169, 170, 346, 298). The evidence further was that in using an opener such as Exhibit No. 1 to open Exhibit 2 no more than 25 pounds pressure would be applied to the cap, and that since there was no physical evidence that such an opener had, in fact, been used, appellant wife could have applied no more than three to four pounds pressure before the fracture was produced, accepting her version of the incident as factual (Tr. 171, 346).

The evidence further established that a bottle having such a defect that it would fracture upon the application of the force applied by appellant wife, could not possibly have passed through appellee's bottling process: Such a bottle would have been exploded by the counter pressure of the filler machine or by the 400 to 800 pounds pressure of the capping machine (Tr. 320, 344, 345).

Appellee's evidence as to the cause of the fracture was presented through the testimony of Dr. Kirk, a Professor of "Criminalistics" at the University of California, Berkeley, who is highly qualified in the scientific evaluation of physical evidence and has performed considerable scientific work in the areas of glass and glass fractures (Tr. 282, 283, 284). On examination of Exhibit 2, Dr. Kirk found that there was an area of extensive cracking beneath the bottle cap; that the fracture of the bottle emanated from that area of crushed glass; that the area of crushed glass was directly beneath a crimp in the cap, which crimp is located directly beneath the letter "L" of the word "Glaser"; that the prong immediately adjacent to such crimp had been deformed by a force directed upward and inward against the neck of the bottle; and, that the side of the cap directly opposite the referred prong and crimp showed a series of markings which were indicative of the application of some kind of tool or device to the cap (Tr. 290-294; Ex. A-12, A-13, A-14). On the basis of such physical evidence, Dr. Kirk concluded that the defect and fracture were caused by some type of tool which employed a pinching-type action and which had been used in an unsuccessful attempt to open the bottle. He stated that his opinion was predicated on the fact that there was a direct correlation between the bent prong, which had been pinched upward and inward against the neck of the bottle, and the point of fracture, together with the fact that the opposite side of the cap showed evidence of the application of some kind of improper tool (Tr. 317). Dr. Kirk further testified that the referred physical damage to the cap could not have been caused by the appellee's capping machine (Tr. 321).

ARGUMENT IN ANSWER TO APPELLANT

Appellants Failed to Produce Legally Sufficient Evidence to Warrant Submission of the Issue of Warranty to the Jury

It is the established law that even where liability is predicated upon an alleged breach of implied warranty, the plaintiff is not relieved of his burden of proof, and it is universally held that in fulfilling that burden plaintiff must establish, *inter alia,* that the alleged defect existed in the product at the time it left the hands of the defendant. Prosser, Law of Torts, 3rd Ed., Ch. 19, pages 683, 684; *Williams v. Paducah Coca Cola Bottling Company,* 343 Ill. App. 1, 98 N.E.2d 164 (1951); *Tiffin v. Great A&P Tea Company,* 20 Ill. App.2d 421, 156 N.E.2d 249 affirm 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Cudahy Packing Company v. Baskin,* 170 Miss. 834, 155 So. 217 (1934); *Kruper v. Proctor & Gamble Company,* 160 Ohio St. 489, 117 N.E.2d 7 (1954).

The only evidence submitted on this key issue by appellants was the opinion testimony of Mr. C. V. Smith. Mr. Smith, it is true, testified that *in his opinion* the defect which caused the bottle to fracture was brought about by the capping operation at appellee's bottling plant (Tr. 159, 160). It is, however, essential to examine the basis for Mr. Smith's stated opinion in determining whether that opinion constitutes substantial evidence of the fact stated.

As has been pointed out in appellee's statement of the case, Mr. Smith testified that (1) the defect resulted from the capping operation (Tr. 159, 160); (2) the cause of the fracture was "the capping device as it came down and crimped the cap" (Tr. 167); (3) the "crimping" he re-

ferred to was produced by a mechanism in the bottling process "that puts the little marks around the edge" of the cap—"the little indentations that are put in by the ends of the fingers of the crimping machine" (Tr. 168); (4) the "crimping machine" is a mechanism which puts the cap on the bottle and after it puts the cap on "the fingers" of the machine squeeze the sides of the cap against the bottle (Tr. 168); (5) that the "crimping machine" consists of a "claw-like mechanism" which is used to put a cap on a bottle and which squeezes the sides of the cap against the bottle (Tr. 175).

While Mr. Smith stated it to be his opinion that the defect in question was created by the "claw-like" crimping machine, appellants produced no evidence that appellee, in fact, used a "claw-like" mechanism in its bottling or capping operation. Mr. Smith's testimony certainly did not constitute evidence of such fact: he stated that he was familiar with appellee's bottling process "in basic principle only," and he admitted that he had not been in appellee's plant and personally observed the operation for ten years (Tr. 167).

The only basis then for Mr. Smith's stated opinion was that he believed that appellee's capping operation consisted of a "claw-like" mechanism which squeezed the cap against the bottle. While not so phrased by Mr. Smith, his testimony has precisely the same effect as though he had stated: "I don't know how the capping operation is carried out, but if it is carried out by a 'claw-like' mechanism which squeezes the cap against the bottle, then, in my opinion, the defect would have been caused by the 'claw-like' mechanism."

The whole basis, then, for Mr. Smith's opinion is his assumption of a supposititious fact—that the bottle was capped by means of a "crimping machine", a "claw-like" mechanism which squeezes the cap against the bottle—and there is no substantial evidence from which a jury could conclude that such a "claw-like crimping machine" in fact existed.

We may go further than that and state that not only was there no evidence in the case establishing the predicate for Mr. Smith's opinion, but that the only evidence in the case was definitely contrary thereto.

It was established by appellee's witnesses, Mr. Duncan, the plant superintendent, and Mr. Alger, who designed and installed the bottling equipment that (1) the mechanism which caps the bottles is known as a "flexible throat" (Tr. 255); (2) there are absolutely no "claws" or "fingers" which grip the cap and squeeze it against the sides of the bottle (Tr. 265, 266, 344); (3) the "flexible throat" does not apply pressure against the sides of the bottle in the capping process (Tr. 275 to 280, 338 to 342); (4) there is no mechanism in appellee's bottling process which puts the "crimp" in the bottle cap, such "crimps" being a part of the cap manufacturing process (Tr. 257, 260, 342, 343; Ex. A-9).

To summarize: The appellants, in order to create a question of fact on the issue of implied warranty, were required to prove that the defect existed at the time the bottle, Exhibit 2, passed from appellee's control; the only evidence submitted on such issue was the opinion evidence of Mr. Smith; Mr. Smith's opinion that the defect was caused by the capping operation is predicated upon

his *surmise* that such operation is carried out by a "claw-like" mechanism which presses the cap against the bottle; and, the only evidence in the case established that there was, in fact, no such mechanism in existence at appellee's plant.

It is the settled rule of law in Washington that a mere scintilla of evidence is not sufficient to create a question of fact on a disputed issue. Jury verdicts may not rest on speculation or conjecture but must be supported by substantial evidence. *Thompson v. Virginia Mason Hospital,* 152 Wash. 297, 277 Pac. 691; *Geisness v. Scow Bay Packing Company,* 16 Wn.2d 1, 132 P.2d 740; *Home Insurance Company v. Northern Pacific Railway,* 18 Wn.2d 798, 140 P.2d 507; *Neel v. Henne,* 30 Wn.2d 24, 190 P.2d 775; *Reusch v. Ford Motor Company,* 196 Wash. 213, 82 P.2d 556; *Prentice v. United Pacific Insurance Company,* 5 Wn.2d 144, 106 P.2d 314.

In the case last cited, plaintiff sought recovery on a policy of insurance for loss sustained as the result of the bursting of an ammonia pipe in plaintiff's cold storage plant. The coverage afforded plaintiff under its policy of insurance was such that only a bursting of the pipe by reason of pressures created by the refrigerant would afford plaintiff a recovery. A verdict and judgment in favor of plaintiff was reversed on appeal. Judge Steinert delivered the court's opinion and stated of the plaintiff's evidence, as follows:

> "In the final analysis, respondent's case hangs upon the evidence of its expert witnesses. The logic of their testimony is simply this: the pressure of the refrigerant could have caused the rupture if the pipe were worn to a thinness of approximately one ten

thousandths of an inch; the rupture did occur; therefore, the pipe must have been worn to the required point. This, however, is but reasoning in a circle. It assumes a fact necessary to establish a cause of action, but concerning which assumed fact there is no evidence, and then imploys the supposititious fact as the basis for a conjecture as to the possible cause of a particular physical result.

"In order to prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture."

* * * * * * * * *

"In the case at bar, there is no evidence of any known facts pointing to, or consistent with, the theory that the pipe had become worn to a thinness of one ten thousandths of an inch and then had been broken by pressure from within. It is the case of indulging in a presumption in order to support a conjecture. Presumptions may not be pyramided upon presumptions nor inference upon inference.

"We will infer a consequence from an established circumstance. We will not infer a circumstance when no more than a possibility is shown."

The cited case presents a striking parallel with the instant situation. Mr. Smith, who had no personal knowledge concerning the equipment actually used by appellee to bottle beverages, assumed that there was a "claw-like" mechanism which gripped the cap and pressed it against the sides of the bottle, and he then opined that the pressure from the "claw-like" mechanism had caused the defect which existed in Exhibit 2. This, as stated in the quoted case, is but reasoning in a circle: there was no evidence to support Mr. Smith's assumption that such a "claw-like" mechanism, in fact, existed.

It is further the law in this jurisdiction that where the opinion of an expert witness is predicated upon an assumption of fact which has no basis in the evidence or which is contrary to the only evidence in the case, the opinion is of no value and does not constitute substantial evidence on a point at issue. *Hagen v. City of Seattle,* 54 Wn.2d 218, 339 P.2d 79.

Appellants failed to produce substantial evidence that the defect in the bottle existed at the time it passed from appellee's control. As it was appellants' burden to produce substantial competent evidence on that issue in order to create a question of fact for the jury's consideration on the issue of implied warranty, it was not error for the trial court to refuse to instruct the jury on such issue.

The Instructions Requested by Appellants on the Issue of Implied Warranty did not Accurately State the Law, Were Confusing and Misleading, and It Was Therefore not Error for the Trial Court to Refuse to so Instruct the Jury

Appellants complain that the trial court erred in refusing to instruct the jury in accordance with their written requests, as follows:

Proposed Instruction No. 3:

> "The defendant, as a bottler of foodstuffs, impliedly warranted to the plaintiff and other customers of its products that the bottles in which its product was sold were reasonably fit for the purpose for which they were intended.
>
> "If you find that the bottle which broke in plaintiff's hand was defective to the extent that it was not reasonably fit for use as a bottle for the soft drink, that the defect was present before the bottle left the defendant's control, and that the defect caused plain-

tiff's injuries, your verdict must be for the plaintiff.

> "Negligence is not an element of required proof when recovery is sought for breach of a warranty, *and no evidence is necessary to establish recovery for a breach of warranty.*" (Italics ours.)

Proposed Instruction No. 12:

> "It is not necessary that plaintiff prove both the defendant's negligence and a breach of warranty. If you find either that the defendant was negligent in one or more respects, or that the defendant breached a warranty, and that such negligence or breach of warranty caused plaintiff's injuries your verdict shall be for the plaintiff."

As has been stated above, the fact that a manufacturer is liable on the basis of implied warranty does not render the manufacturer an insurer of the condition of the product nor does such fact dispense with the plaintiff's burden of proof. The plaintiff, in an action predicated upon breach of implied warranty, has the burden of proving that the injury was caused by a defect in the product and that the defect existed in the product when it left the hands of the manufacturer. Prosser on Torts, 3rd Ed., Ch. 19, pages 683, 684; *Williams v. Paducah Coca Cola Bottling Company,* 343 Ill. App. 1, 98 N.W.2d 1964 (1951); *Tiffin v. Great A&P Tea Company,* 20 Ill. App.2d 421, 156 N.E.2d 249, affirm 1959, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Cudahy Packing Company v. Baskin,* 170 Miss. 834, 155 So. 217 (1934); *Kruper v. Proctor & Gamble Company,* 160 Ohio St. 489, 117 N.E.2d 7 (1954).

The last paragraph of proposed Instruction No. 3, then, is clearly erroneous, since it informs the jury that "no evidence is necessary to establish recovery for a breach of warranty." The error is further not cured by the second

paragraph of the proposed instruction. That paragraph does not state that no recovery could be had on the basis of breach of warranty unless the jury found (1) that the bottle was not reasonably fit, (2) that the defect existed before the bottle left defendant's control, and (3) that the defect caused plaintiff's injuries; the instruction states that the verdict "must be for plaintiff" if those facts are found. Further, that paragraph of the proposed instruction does not, in any way, refer to breach of warranty, and a jury might well conclude that the second and third paragraphs dealt with separate bases of recovery: that is, if they found the above enumerated facts in (1), (2) and (3) to have been proven, they were required to return a verdict for plaintiffs, but that, recovery on the basis of implied warranty might be had absent proof of those facts or any others. At best the proposed instruction was ambiguous and very likely would have confused the jury. It is submitted that had the proposed instruction been given, a verdict in favor of plaintiffs would have required reversal on the basis of the objectionable portions of Instruction No. 3.

Proposed Instruction No. 12 was also inadequate and the trial court did not err in refusing to give it. Standing alone, the instruction is objectionable because it fails to advise the jury of the proof that plaintiffs were required to make before recovery could be had on the basis of implied warranty. When presented to the jury in conjunction with proposed Instruction No. 3, it is, of course, tainted by the misleading and objectionable language of that instruction.

If a proposed instruction incorrectly states the law or

is liable to confuse or mislead the jury, it is not error for the trial court to refuse to give such instruction, and it is well settled that the trial court is under no duty to rewrite such proposed instructions. *Wong v. Swier* (C.A. 9th), 267 F.2d 749; *Fidelity and Casualty Company of New York v. Manley* (C.A. 5th) 132 F.2d 127; *Ramm v. Hewitt-Lea Lumber Company,* 49 Wash. 263, 94 Pac. 1081; *Hanson v. Sandvik,* 128 Wash. 60, 222 Pac. 205; *Amann v. City of Tacoma,* 170 Wash. 296, 16 P.2d 601; *Krogh v. Pembla,* 50 Wn.2d 250, 310 P.2d 1069.

Accordingly, it was not error for the trial court to refuse to instruct the jury as requested by appellants, and as no proper instructions were prepared by appellants on the theory of implied warranty, the failure to instruct on that issue does not constitute reversible error.

There is no "Strong Judicial Trend" Toward Imposing Upon a Bottler Liability on the Basis of an Implied Warranty Where the Injured Party is not in Privity With the Bottler

Appellants contend that there is a "strong judicial trend" in the direction of imposing liability based on an implied warranty by the bottler of soft drink beverages where one not in privity with the bottler sustained injury by reason of a defect in a bottle. It is asserted by appellants at page 11 of their brief that "a majority of jurisdictions deciding the question" have held the bottler liable on the basis of implied warranty under such circumstances. At page 12 of appellant's brief, a number of cases are cited which appellants assert hold that "a bottler or other packager" warrants the fitness of the container in which the product is dispensed.

A review of the cases cited, however, reveals that only two, both from the State of Florida (*Canada Dry Bottling Company v. Shaw*, 118 So.2d 840 and *Renninger v. Foremost Dairies, Inc.*, 171 So.2d 602) in fact support appellants' principal thesis. In the case of *Florida Coca Cola Bottling Company v. Jordan, et al.*, 62 So.2d 910 (Fla. 1953), the plaintiff was allegedly injured upon swallowing a piece of broken glass which was contained in a beverage bottled by the defendant. There was, accordingly, no question presented under that case regarding the bottler's liability for defects in the container itself.

The case of *Mead v. Coca Cola Bottling Company*, 108 N.E.2d 757 (Mass. 1952) involved a situation in which the bottled beverage allegedly causing plaintiff's injury was purchased by plaintiff from a vending machine owned and maintained by the defendant. Accordingly, in that case there clearly was privity between the plaintiff and defendant, and the case is therefore not in point at all. The court there held, and properly so, that the plaintiff's purchase of the bottle from the defendant's vending machine constituted a sale within the meaning of a statute imposing liability upon the seller for the failure of the goods to be of merchantable quality.

The case of *Hadley v. Hillcrest Dairy, Inc.*, 171 N.E.2d 393 (Mass. 1961) is similarly not in point. In that case, there was a direct sale of the product in question from the defendant to the plaintiff. The court decided the case on the basis of the statutory implied warranty imposed upon the defendant by the Uniform Sales Act.

In the case of *Mahoney v. Shaker Square Beverages*, 102 N.E.2d 281 (Ohio 1951) plaintiff instituted an action

against the retailer, not the bottler. The court there held (1) that the implied warranty of merchantability arising from the Uniform Sales Act applied to members of the purchaser's family (including servants), and (2) that the plaintiff also had a cause of action against the defendant retailer in negligence because of the latter's violation of the state's pure food statute. There again, there was privity between the plaintiff and the defendant and, in any event, the bottler of the beverage was not involved in the action.

In the case of *Vallis v. Canada Dry Ginger Ale, Inc.*, 11 Cal. Rptr. 823, 190 Cal. App.2d 35 (Cal. App. 1961) the court's decision turned on the implied warranty extended by the Uniform Sales Act, the principal question being whether such warranty extended to employees of a vendee. Here also there was privity between the plaintiff and defendant and accordingly the case is not in point.

The case of *Jones v. Burgermeister Brewing Corporation*, 18 Cal. Reptr. 311, 198 Cal. App.2d 198 (Cal. App. 1962) involved an appeal by the plaintiff from an adverse judgment in an action instituted against the defendant brewer and the defendant distributor of the bottled beverage. On appeal the plaintiff contended that the trial court should have instructed the jury on the theory of implied warranty as well as upon negligence. No contention was advanced by the defendant brewer on appeal that it could not be held liable on the basis of implied warranty to the plaintiff, and that issue was not directly considered or resolved by the court. Further, the opinion does not clearly state the relationship which existed between the defendant brewer and the defendant distribu-

tor and, depending upon the precise nature of that relationship, there could well have been privity between the defendant brewer and the plaintiff. The failure of the defendant brewer to raise the issue of its non-liability on the basis of implied warranty strongly suggests that there was no intervening sale of the product to the defendant distributor and that accordingly privity existed between the defendant brewer and the plaintiff.

In the case of *Vassallo v. Sabatte Land Company*, 27 Cal. Reptr. 814, 212 Cal. App.2d 11 (Cal. App. 1963) the plaintiff's action was instituted against the retailer who sold the product to the plaintiff. Privity existed, as in the other cases above cited, and the court's decision was based on the warranty imposed by the Uniform Sales Act.

In *Faucette v. Lucky Stores, Inc.*, 33 Cal. Rptr. 215, 219 Cal. App.2d 196 (Cal. App. 1963) the plaintiff brought action against both the defendant bottler and the defendant retailer, and the defendant retailer cross-claimed against the defendant bottler. The trial court dismissed the plaintiff's action against the bottler on the basis that there was no implied warranty running between the bottler and the plaintiff. The propriety of the trial court's ruling in that regard was not raised on appeal and the decision in no way stands for the proposition advanced by appellants.

It thus appears quite clear, contrary to appellants' assertion that only one jurisdiction, Florida, has declared that a bottler of beverages is liable on the basis of implied warranty, in the absence of privity, for injuries caused by defects in a bottle. It is submitted that a single

decision of the Florida appellate court does not define "a strong judicial trend". There are, however, cases from other jurisdictions which expressly hold that a bottler is not liable on the basis of implied warranty in the absence of privity, for injuries caused by defects in a bottle. *Leggier v. Philadephia Coca Cola Bottling Company,* (1959 DC Pa) 171 Fed. Supp. 749; *Jax Beer v. Schaeffer* (1943 Tex. Civ. App.) 173 S.W.2d 285; *Latham v. Coca Cola Bottling Company,* (1943 Tex. Civ. App.) 175 S.W.2d 426; *Anheuser Bush, Inc. v. Butler,* (1944 Tex. Civ. App.) 180 S.W.2d 996.

It is the Settled Rule of Law in the State of Washington That There can be no Recovery Against a Manufacturer, on the Basis of Breach of Implied Warranty, in the Absence of Privity, the Only Exceptions to Such Rule Being in Cases Involving Food or Inherently Dangerous Products

Appellants assert that the Washington Supreme Court would hold "without substantial doubt" that the issue of appellee's liability on the basis of implied warranty should have been submitted to the jury in the case at bar. Significantly, no cases are cited by appellants in support of that proposition.

In fact, the established rule of law in the state of Washington is to the contrary.

It is true, as noted by appellants, that the Washington Supreme Court, since its decision in the case of *Mazetti v. Armour,* 75 Wash. 622, 135 Pac. 633 (1913), has consistently held that a manufacturer may be held liable on the basis of implied warranty, in the absence of privity, for injuries caused by *consumable* products, such as food,

(*Nelson v. West Coast Dairy*, 5 Wn.2d 284, 105 P.2d 76 (1940); *Geisness v. Scow Bay Packing Company*, 16 Wn.2d 1, 132 P.2d 740 (1942); *LaHue v. Coca Cola Bottling, Inc.*, 50 Wn.2d 645, 314 P.2d 421, (1957)) and cosmetics (*Esborg v. Bailey Drug Company*, 61 Wn. 2d 347, 378 P.2d 298 (1963)). Other decisions of the Washington Court, however, which are concurrent with the last cited cases, make it clear, beyond cavil, that in the absence of contractual privity, no recovery may be had against a manufacturer *on the basis of implied warranty* for injuries caused by non-consumable products.

In *Foster v. Ford Motor Company*, 139 Wash. 341, 246 Pac. 945 (1926), which involved an allegedly defective tractor, the Washington Supreme Court reversed a judgment in plaintiff's favor stating (at page 350):

> "The third, *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C 140, 48 L.R.A. (N.S.) 213, was an action against the manufacturer for putting out poisonous food. A recovery was sustained.
>
> "It is, of course, apparent that these cases, involving explosives or poisonous substances, do not come under the rules applicable to articles which are imminently dangerous through defects in design or construction."

In *Reusch v. Ford Motor Company*, 196 Wash. 213, 82 P.2d 556 (1938), involving injuries allegedly sustained by reason of defendant's defective truck, the Washington Supreme Court held that recovery could only be had on proof of negligence and stated (at page 223):

> "The poisonous food cases are not analogous to the situation presented in the case at bar."

The case of *Murphy v. Plymouth Motor Corporation,* 3 Wn.2d 180, 100 P.2d 30 (1940), involved an action by the purchaser of an automobile against the manufacturer on the basis of implied warranty. The Washington Supreme Court held that there was no liability on the basis of implied warranty and in so doing stated (at page 184):

> "The doctrine of implied warranty with reference to the sale of patent medicines and prepared food products (*Matzetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C 140, 48 L.R.A. (N.S.) 213 is not applicable to an automobile."

In *Dobbin v. Pacific Coast Coal Company,* 25 Wn.2d 190, 170 P.2d 642 (1946) plaintiff brought an action for damages allegedly suffered as the result of a defective furnace which had been manufactured by defendant but which was purchased by plaintiff from another party. Plaintiff's action, in part, was predicated on an alleged breach of implied warranty of fitness. The Washington Supreme Court there stated (at page 196):

> "The trial court rightly held, in its first memorandum opinion, that, since there was no privity whatever between the plaintiff and any of the defendants, the plaintiff could not recover against any of them on the theory of breach of warranty, express or implied, or any other conractual theory."

Thus, it is clear that the Washington Supreme Court has consistently held that a vendee of an allegedly defective product has no right of action against the manufacture of such product based on implied warranty in the absence of privity.

Appellants cite several Washington cases as support for the proposition that the Washington Supreme Court has clearly indicated "a policy toward abolition of the privity

requirement and the extension of warranty-based liability." The cases cited do not, in fact, support the proposition advanced.

The case of *Freeman v. Navarre*, 47 Wn.2d 760, 289 P.2d 1015 (1955) was in no way concerned with a manufacturer's liability, in the absence of privity of contract, on the basis of implied warranty. The Supreme Court there simply affirmed that, in the absence of privity, a manufacturer may be held liable for its negligence. It is, in fact, tacit in the court's opinion that such a remote vendee can only recover on a showing that the manufacturer failed to exercise reasonable care. The court there stated:

> "The reasoning of the above cases is based upon fundamental concepts of the law of negligence. The wrong consists in an act creating an unreasonable risk of harm to the person or property of another, where it is foreseeable that the failure to use reasonable care will create such risk. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253. In the case of a manufacturer who, through national advertising media such as magazines, newspapers, radio and television, creates a demand for his product and does the affirmative act of putting such product in the channels of trade, it is foreseeable that if reasonable care is not used in manufacturing a risk of injury to the person or property *of the ultimate consumer* is apt or likely to result. Actually, in the final analysis, no other person in the distributive chain needs protection. The whole discussion of contract law in this tort area is misleading, since the duty of care on the part of the manufacturer does not arise out of contract, but *out of the fact of offering goods on the market to remote users, as to whom there is a foreseeable risk of harm, if due care is not used.*
>
> "Of course, for the risk to be foreseeable, the use

> to which the goods are put must be the intended one. However, in the case at bar, all of the elements of a tort are present, and, if appellant can prove a 'failure to use reasonable care on the part of the respondent manufacturer, he should be entitled to recover.' "

The case of *Esborg v. Bailey Drug Company,* 61 Wn.2d 347, 378 P.2d 298 (1963) in no manner altered existing Washington law on the subject of a manufacturer's liability in implied warranty in the absence of privity. The decision, which is expressly predicated on the case of *Mazetti v. Armour,* 75 Wash. 622, 135 Pac. 633 (1913), merely affirms that in the case of defective *consumable* products a remote vendee may recover against the manufacturer on the basis of breach of implied warranty despite lack of privity.

The same is true of the case of *Brewer v. Oriard Powder Company,* 66 Wn.2d 187, 401 P.2d 844 (1965). While the author of the opinion gratuitously observed that "it seems that a searching judicial review of the privity rule is in order," the holding of the case—that "a manufacturer of dynamite is liable to the ultimate user for breach of implied warranty of fitness without regard to privity—does not constitute a departure from earlier decisions of the court. The case is nothing more than a logical extension of the decision in *Marsh v. Usk Hardware Company,* 73 Wash. 543, 132 Pac. 241 (1913); and the Washington Supreme Court early recognized that cases involving sales of explosives were to be resolved on the same basis as sales of foodstuffs. *Foster v. Ford Motor Company,* 139 Wash. 341, 350, 351, 246 Pac. 945.

It should be further noted that the case of *Ringstad v. I. Magnin & Co.,* 39 Wn.2d 923, 239 P.2d 848, does not

deal with the issue here at hand. In that case there was contractual privity between the plaintiff and defendant and the court's decision is accordingly based on the implied warranty imposed upon the defendant by the Uniform Sales Act.

It is clear from a review of pertinent Washington decisions that the issue presented by the case at bar is one which has been considered by the Washington court on numerous occasions and the Washington court has uniformly held that in the absence of contractual privity no action may be maintained against a manufacturer on the basis of breach of implied warranty, except in cases involving consumable items and inherently dangerous articles, such as dynamite.

Appellants have extended an invitation to this court to enter a decision which would drastically alter the rule of law as announced by numerous decisions of the Washington State Supreme Court. As has been seen, the effect of such a decision by this court would be to overrule a series of Washington Supreme Court decisions extending from the year 1913 until the present. It is respectfully submitted that this court's true role in a diversity case is to determine and apply existing state law, not to reshape such law. *Polk County, Georgia v. Lincoln National Life Insurance Company,* 262 F.2d 486 (C.C.A. Ga. 1959); *Yoder v. Nu-Enamel Corporation,* 117 F.2d 488 (C.C.A. Neb. 1941).

CONCLUSION

The law is settled in the State of Washington that there is no right of action against a manufacturer on the basis of breach of implied warranty in the absence of privity, excepting only situations dealing with the sale of consumable items and inherently dangerous products, such as explosives.

Additionally, appellants failed to submit legally sufficient evidence establishing that the defect which caused the bottle to fracture existed before the bottle left appellee's control. Even assuming that appellants had a cause of action on the basis of a claimed breach of implied warranty, they failed to produce sufficient evidence to carry the issue to the jury.

Further, the instructions requested by appellants on the issue of appellee's alleged liability in implied warranty did not accurately state the law with respect thereto and were confusing and misleading.

For all the reasons herein assigned the trial court did not err in refusing to instruct the jury as proposed by appellants and the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frank W. Draper
of Attorneys for Appellee